

## **Board of Forestry and Fire Protection**

### **NOTICE OF PROPOSED ACTION**

**“Listed Anadromous Salmonid Amendments, 2016”**

**Title 14 of the California Code of Regulations (14 CCR),  
Division 1.5, Chapter 4:  
Subchapter 1, Article 1  
Amend: § 895.1  
Subchapter 2, Article 2  
Amend: § 898.2**

[Notice Published June 03, 2016]

#### **NATURE OF PROCEEDING**

Notice is hereby given that the California State Board of Forestry and Fire Protection (Board) is proposing to take the action described in the Informative Digest.

#### **PUBLIC HEARING**

The Board will hold a public hearing on Thursday, July 21, 2016, at its regularly scheduled meeting commencing at approximately 9:00 a.m., at the Twin Pine Casino and Hotel, 22223 S State Highway 29, Middletown, California, 95461. At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action. The Board requests, but does not require, that persons who make oral comments at the hearing submit a written summary of their statements.

Additionally, pursuant to **Government Code (GOV) § 11125.1(b)**, writings that are public records pursuant to **GOV § 11125.1(a)** and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person.

#### **WRITTEN COMMENT PERIOD**

Any person, or authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period ends at 5:00 P.M. on Monday, July 18, 2016.

The Board will consider only written comments received at the Board office by that time and those written comments received at the public hearing, including written comments submitted in connection with oral testimony at the public hearing. The Board requests, but does not require, that persons who submit written comments to the Board reference the title of the rulemaking proposal in their comments to facilitate review.

Written comments shall be submitted to the following address:

Board of Forestry and Fire Protection  
Attn: Matt Dias  
Acting Executive Officer  
P.O. Box 944246  
Sacramento, CA 94244-2460

Written comments can also be hand delivered to the contact person listed in this notice at the following address:

Board of Forestry and Fire Protection  
Room 1506-14  
1416 9<sup>th</sup> Street  
Sacramento, CA 95814

Written comments may also be sent to the Board via facsimile at the following phone number:

(916) 653-0989

Written comments may also be delivered via e-mail at the following address:

publiccomments@BOF.ca.gov

**AUTHORITY AND REFERENCE (pursuant to GOV § 11346.5(a)(2) and 1 CCR § 14)**

**14 CCR § 895.1** Note: Authority cited: Sections 4551, 4551.5, 4553, 4561, 4561.5, 4562, 4562.5, 4562.7 and 4591.1, Public Resources Code. Reference: Sections 4512, 4513, 4525.5, 4525.7, 4526, 4528, 4551, 4551.5, 4561, 4562, 4562.5, 4562.7, 4583.2, 4584, 4591.1, 21001(f), 21080.5, 21083.2 and 21084.1, Public Resources Code; CEQA Guidelines Appendix K (printed following Section 15387 of Title 14 Cal. Code of Regulations), *Laupheimer v. State* (1988) 200 Cal.App.3d 440; 246 Cal.Rptr. 82 and *Joy Road Area Forest and Watershed Association, v. California Department of Forestry & Fire Protection*, Sonoma County Superior Court No. SCV 229850.

**14 CCR § 898.2** Note: Authority cited: Sections 4551, 4555 and 4582, Public Resources Code. Reference: Sections 2053, 2080.1, 2090-2097, 2830 and 2835, Fish and Game Code; Sections 4555, 4582.7 and 4582.75, Public Resources Code; Section 51115.1, Government Code; the federal Endangered Species Act of 1973, 16 U.S.C. Section 1531 et seq.; and *Laupheimer v. State* (1988) 200 Cal.App.3d 440; 246 Cal.Rptr. 82.

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW (pursuant to 11346.5(a)(3)(A)-(D))**

Pursuant to the Z'berg-Nejedly Forest Practice Act of 1973 (FPA, PRC § 4511, *et seq.*), the Board is authorized to construct a system of forest practice regulations applicable to timber management on state and private timberlands. According to PRC § 4551(a) the board shall adopt district forest practice rules and regulations for each district in accordance with the policies set forth in Article 1 (commencing with §4511) of this chapter and pursuant to Chapter 3.5 (commencing with §11340) of Part 1 of Division 3 of Title 2 of the Government Code to ensure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, wildlife, and water resources, including, but not limited to, streams, lakes and estuaries.

Additionally, under PRC§ 4584, the Board, upon determining that the modifications to existing definitions are necessary, and criterion by which the Director may approve a timber harvest plan that may result in incidental take of experimental populations of federally listed anadromous salmonids are consistent with the purposes of the Z'Berg-Nejedly Forest Practice Act of 1973 (FPA, PRC § 4511, *et seq.*), may exempt from this FPA, or portions of this FPA, a person engaged in specific forest management activities.

The history of the development of this proposed regulation is as follows:

- The Board received an official request dated July 6<sup>th</sup>, 2015 from Ms. Maria Rea, Assistant Regional Administrator of the California Central Valley Office, of the United States National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS). Ms. Rea requested that the Board revise provisions of the California Forest Practice Rules (FPRs) related to the protection of anadromous salmonids listed under the federal Endangered Species Act of 1973 as amended (FESA), intending to address potential impediments to proposed recovery actions involving reintroduction of listed experimental populations of salmonids (ESA; 16 U.S.C. § 1531 *et seq.*). The purpose of this request was to ensure the "conservation and recovery of anadromous salmonids in California", while safeguarding landowner rights for activities governed by the FPRs Rules from the introduction of experimental salmonid populations.
- This regulatory request received concurrence and support from the California Department of Fish and Wildlife (DFW), with a letter received by the Board on July 14, 2015, authored by DFW Director Charlton H. Bonham.
- The Board, at the regularly scheduled Board meeting on July 23<sup>rd</sup>, 2015 authorized the noticing of a 45-day notice for rulemaking efforts on what was formerly known as "10(j) Experimental Populations Amendments, 2015."
- The Board, at its regularly scheduled meeting on May 12<sup>th</sup>, 2016, rescinded the previous July 23<sup>rd</sup>, 2015 action for this rulemaking package, and re-authorized

noticing of this revised text now referred to as “Listed Anadromous Salmonid Amendments, 2016.”

The purpose of the proposed action is to make permanent, through regular rulemaking, these amendments.

The effect of the proposed action is to provide a person engaging in the harvesting of timber a reprieve, from the Anadromous Salmonid Protection Rules (ASP) (14 CCR, §916.9 et seq.), when either of the two following situations exist. First, this amended regulatory language will apply when Experimental Populations of listed anadromous salmonids are introduced into watersheds associated with activities regulated by the FPRs or in situations where historical but unoccupied habitats can be restored to support listed salmonid populations, but man-made or natural structures inhibiting anadromy are in place and their removal or remediation is deemed impractical<sup>1</sup> or not economically feasible. Second, this exemption seeks to reprieve the Director from the immediate disapproval of proposed Timber Harvest Plans (currently required by 14 CCR §898.2), in watersheds where listed anadromous salmonids are present and affected by lawful activities governed by the FPRs, if “take” is authorized by the appropriate federal or state wildlife agency in accordance with the FESA or California Endangered Species Act (CESA).

The primary benefit of the proposed action is to protect the right of landowners to legally harvest timber without further restriction from the ASP rules in watersheds where anadromous salmonid populations are, or become, present through introduction in portions of watersheds that are located above natural or manmade (non-restorable) barriers to anadromy. Additionally, existing Board rules, 14 CCR § 898.2 requires the Director to disapprove a plan as not conforming to the rules of the Board if... “(d) Implementation of the plan as proposed would result in either taking or finding of jeopardy of wildlife species as rare, threatened or endangered, by the Fish & Game Commission, the National Marine Fisheries Service, or Fish & Wildlife Service, or would cause significant, long term damage to listed species.” Since these experimental salmonid populations are Federally listed as “Threatened” and/or State listed as “Threatened” or “Endangered”, certain exceptions can be made, pursuant to FESA or CESA, to allow for incidental “take”<sup>2</sup> where otherwise lawful timber harvest activities occur. For instance, the NMFS has recommended, in circumstances where a 4(d) rule exempts otherwise lawful activities (i.e. approved forest management) as part of an experimental population designation, that additional forest management restrictions need not apply. This will ensure that the artificial introduction, subsequent existence, and ongoing population restoration actions of these listed salmonid populations will not compromise the economic benefits to landowners from timber harvest activities.

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<sup>1</sup> The determination of whether barriers to fish passage are deemed immovable, impractical, or not economically feasible to remove will lie jointly under the jurisdiction of the DFW and NMFS.

<sup>2</sup> Under ESA; 16 U.S.C. § 1531 et seq., §3 (19) states, “The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

There is no comparable federal regulation or statute.

Board staff conducted an evaluation to determine whether or not the proposed action is inconsistent or incompatible with existing State regulations pursuant to **GOV § 11346.5(a)(3)(D)**. State regulations related to the proposed action were, in fact, relied upon in the development of the proposed action (including portions of 14 CCR §§ 895.1 and 14 CCR § 898.2, § 916.9 [936.9, 956.9]) and to improve the consistency and compatibility of the proposed action with existing State regulations. Otherwise, Board staff evaluated the balance of existing State regulations related to the system of forest practice applicable to timber management and protection of introduced salmonids on state and private timberlands pursuant to the FPRs and found existing State regulations, which attempts to meet the same purpose as the proposed action but does so in a manner that is not as explicit as the draft regulatory proposal. Existing regulation, found under 14 CCR § 916.9 (Geographic Scope), states “These requirements do not apply to upstream watersheds where permanent dams attenuate the transport of fine sediment to downstream watercourses with listed anadromous salmonids.” The Board determined that this statement does not meet the need to properly address experimental populations, or when experimental populations are placed above permanent barriers to fish passage that are impractical to remove. The draft regulatory proposal was promulgated to make existing regulation explicit. Based on this evaluation and effort, the Board has determined that the proposed regulations are neither inconsistent nor incompatible with existing State regulations. The proposed regulation is entirely consistent and compatible with existing Board rules; it simply amends the rules providing improved consistency and clarity.

The Board recognizes that future rulemaking may be necessary to further define watersheds with listed anadromous salmonids when introduced, if and when these listed salmonid populations are designated by the NMFS as 4(d) experimental populations as defined in the FESA as amended, to maintain future consistency and congruity with federal and state regulations. The Board will strive to increase its consultation and discussion with federal wildlife agencies pursuing the introduction of these experimental populations, to avoid redundancy and ensure effective implementation and compatibility of clear and concise regulatory language to protect the best interest of the State and its citizens within its realm of jurisdiction.

No documents are incorporated by reference.

#### **MANDATED BY FEDERAL LAW OR REGULATIONS**

The proposed action is not mandated by federal law or regulations.

The proposed action neither conflicts with, nor duplicates, Federal regulations.

There are no comparable Federal regulations related to the system of forest practice applicable to timber management on state and private timberlands developed pursuant

to the FPRs. No existing Federal regulations meeting the same purpose as the proposed action were identified.

**OTHER STATUTORY REQUIREMENTS (pursuant to GOV § 11346.5(a)(4))**

There are no other matters as are prescribed by statute applicable to the specific State agency or to any specific regulation or class of regulations.

**LOCAL MANDATE (pursuant to GOV § 11346.5(a)(5))**

The proposed action does not impose a mandate on local agencies or school districts.

**FISCAL IMPACT (pursuant to GOV § 11346.5(a)(6))**

There is no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

Although the proposed action will improve the implementation of the FPRs and make the review of plans and enforcement more efficient, a savings is not expected given the small scale of the proposed action. In general, the cost to administer the Forest Practice Program is covered by the Timber Regulation and Restoration Fund. The proposed action will not produce costs or savings to any State agency.

The proposed action will not result in the imposition of other non-discretionary costs or savings to local agencies.

The proposed action will not result in costs or savings in federal funding to the State.

**HOUSING COSTS (pursuant to GOV § 11346.5(a)(12))**

The proposed action will not significantly affect housing costs.

**SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE (pursuant to GOV §§ 11346.3(a), 11346.5(a)(7) and 11346.5(a)(8))**

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Pursuant to **GOV § 11346.5(a)(8)**, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support this initial determination:

This initial determination is based on consideration, by the Board in May of 2016, of the economic impact of each provision of the proposed action.

**STATEMENTS OF THE RESULTS OF THE ECONOMIC IMPACT ASSESSMENT (EIA)**

The results of the economic impact assessment are provided below pursuant to **GOV § 11346.5(a)(10)** and prepared pursuant to **GOV § 11346.3(b)(1)(A)-(D)**. The proposed action:

- (A) will not create or eliminate jobs within California;
- (B) will not create new businesses or eliminate existing businesses within California;
- (C) will not affect the expansion of businesses currently doing business within California.
- (D) will yield nonmonetary benefits through improved implementation of the Forest Practice Rules that will yield improved resource protection, planning (efficiency in plan development and plan review), and enforcement (more enforceable and achievable).

**COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS (pursuant to GOV § 11346.5(a)(9))**

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**BUSINESS REPORT (pursuant to GOV §§ 11346.5(a)(11) and 11346.3(d))**

The proposed action does not impose a business reporting requirement.

**SMALL BUSINESS (defined in GOV 11342.610)**

Small business, pursuant to 1 CCR 4(a) and (b);

- (1) Is legally required to comply with the regulation;
- (2) Is not legally required to enforce the regulation;
- (3) Does not derive a benefit from the enforcement of the regulation;
- (4) May incur a detriment from the enforcement of the regulation if they do not comply with the regulation.

The proposed action is to provide clear and definitive legal language regarding the presence of salmonid populations and their regulatory effects upon timber harvest activities. It simply amends the regulations to appropriately address how the FPRs will apply when salmonids are present by artificial means or are upstream of permanent barriers to fish passage. In addition, the proposed action makes specific statute and updates the rules to be consistent with statute. Accordingly, the proposed action improves the implementation of the FPRs and makes the development of plans more efficient and enforcement more achievable. Small business may be affected by the proposed action.

**CONSIDERATION OF ALTERNATIVES**

In accordance with **GOV § 11346.5(a)(13)**, the Board must determine that no reasonable alternative it considers, or that has otherwise been identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

## CONTACT PERSON

Requests for copies of the proposed text of the regulations, the Initial Statement of Reasons, modified text of the regulations, and any questions regarding the substance of the proposed action may be directed to:

Board of Forestry and Fire Protection  
Attn: Matt Dias  
Acting Executive Officer  
P.O. Box 944246  
Sacramento, CA 94244-2460  
Telephone: (916) 653-9633

The designated backup person in the event Mr. Matt Dias is not available is Mr. Connor Pompa, Regulations Forestry Assistant II. Mr. Pompa may be contacted at the above address or by phone at (916) 653-9066.

## AVAILABILITY STATEMENTS (pursuant to GOV § 11346.5(a)(16))

All of the following are available from the contact person:

1. Express terms of the proposed action using UNDERLINE to indicate an addition to the California Code of Regulations and ~~STRIKETHROUGH~~ to indicate a deletion.
2. Initial Statement of Reasons, which includes a statement of the specific purpose of each adoption, amendment, or repeal, the problem the Board is addressing, and the rationale for the determination by the Board that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed.
3. The information upon which the proposed action is based (pursuant to **GOV § 11346.5(b)** and **GOV § 11346.2(a)**).
4. Changed or modified text. After holding the hearing and considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text—with the changes clearly indicated—available to the public for at least 15 days before the Board adopts the regulations as revised. Notice of the comment period on changed regulations, and the full text as modified, will be sent to any person who testified at the hearings, submitted comments during the public comment period, including written and oral comments received at the public hearing, or requested notification of the availability of such changes from the Board of Forestry and Fire Protection. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

## FINAL STATEMENT OF REASONS

When the Final Statement of Reasons (FSOR) has been prepared, the FSOR will be available from the contact person on request.



**INTERNET ACCESS**

All of the material referenced in the Availability Statements is also available on the Board web site at:

[http://www.bof.fire.ca.gov/regulations/proposed\\_rule\\_packages/](http://www.bof.fire.ca.gov/regulations/proposed_rule_packages/)